All Persons in Occupation of the House and the Wooden Stores Erected on a Portion of Land Held Under Grant No 26977 for Lot 4271 in the Township of Johor Bahru, Johor v Punca Klasik Sdn Bhd

HIGH COURT (JOHOR BAHRU) — ORIGINATING SUMMONS NO 24-872-1994
ABDUL MALIK ISHAK J
12 MARCH 1996

Civil Procedure *— Stay of proceedings — Stay pending appeal — Whether court should adopt special circumstances approach or nugatory approach — Whether there were any special circumstances to warrant a stay of proceedings — Whether stay of proceedings would be allowed when applying the nugatory approach — Whether there was any material in affidavit to warrant a stay of proceedings*

On 30 May 1995, the court ordered vacant possession ('the first order') in favour of the respondent ('Punca Klasik') pursuant to an application by Punca Klasik under O 89 of the Rules of the High Court 1980 ('the RHC'). There was no appeal lodged with regard to the first order. On 22 June 1995, the court ordered that no compensation was forthcoming to the appellants ('the second order'). On 18 July 1995, the appellants lodged an appeal against the second order. The appellants later filed an application to the Court of Appeal for an extension of time to file their notice of appeal in respect of the first order. In the meantime, the appellants made an application for a stay of proceedings in order to preserve the integrity of the appeal against the first order. The issue here was whether the appellants were entitled to such stay of proceedings. In support of the application for a stay of proceedings, the appellants argued that there was a vital issue of public interest that would be canvassed before the Court of Appeal and it revolved on the question of whether a person who claimed to have a proprietary right in land or a right in equity or a right in contract and who had stayed on the land for 37 years could be deprived of the right to stay there by a summary procedure envisaged in O 89 of the RHC. Further, it was submitted that O 89 of the RHC was not in accordance with law and that it infringed art 13 of the Federal Constitution. These arguments were nevertheless not reflected in the affidavit of one Ng Eng Hing in support of the application for stay of proceedings.

Held, dismissing the application:

(1) A stay of proceedings arises under an order of the court and it puts a stop to the further conduct of the proceedings. The order is generally discretionary in nature and generally made very sparingly and only in exceptional or special circumstances. The court will exercise great care and circumspection so as not to drive the plaintiff from the judgment seat in an application for a

stay of proceedings pending an appeal (see p 538C–E; *Bettinson v Bettinson* [1965] Ch 465; [1965] 1 All ER 102, *Lawrence v Lord Norreys* (1890) 15 App Cas 210, *Wu Shu Chen (sole executrix of the estate of Goh Keng How, decd) v Raja Zainal Abidin bin Raja Hussin & Anor* [1995] 3 MLJ 224 and *Dyson v A-G* [1911] 1 KB 410 followed).

(2) On the principle of stare decisis, the court was bound by the Federal Court decisions to adopt the special circumstances approach. As there was no appeal against the first order, the arguments given in Ng Eng Hing's affidavit in support of the application for stay of proceedings could not be considered to be special circumstances. There was no need to put the appellants back to their original position because by not appealing against the first order, it must be presumed that they were happy with the order for vacant possession granted in favour of Punca Klasik. In fact, even if there was an appeal in regard to the first order it could not by itself constitute special circumstances. Further, Ng Eng Hing's affidavit did not advert to O 89 of the RHC which was said to infringe art 13 of the Federal Constitution which would mean that the submission on that point was merely an afterthought (see p 542A, F; *Kerajaan Malaysia v Dato' Haji Ghani Gilong* [1995] 2 MLJ 119, *Kerajaan Malaysia v Jasanusa Sdn Bhd* [1995] 2 MLJ 105, *Wu Shu Chen (sole executrix of the estate of Goh Keng How, decd) v Raja Zainal Abidin bin Raja Hussin & Anor* [1995] 3 MLJ 224 and *Che Wan Development Sdn Bhd v Co-operative Central Bank Bhd* [1989] 3 MLJ 40 followed; *See Teow Guan & Ors v Kian Joo Holdings Sdn Bhd & Ors* [1995] 3 MLJ 598 not followed).

(3) Even by applying the nugatory approach, the application for stay of proceedings would not succeed as there was a failure by the appellants to demonstrate by affidavit evidence that the appeal would be rendered nugatory in the event the appellants succeeded in the appeal. There was also an absence of any averment that Punca Klasik was not in a position to satisfy any compensation that may be awarded to the appellants by the Court of Appeal in the event the appeal was successful. Basically, there was no material demonstrated in the affidavit to warrant a stay of the proceedings (see pp 542C–E, 543B).

[Bahasa Malaysia summary

Pada 30 Mei 1995, mahkamah telah memerintahkan milikan kosong ('perintah yang pertama') yang memihak kepada penentang ('Punca Klasik') berikutan daripada permohonan oleh Punca Klasik di bawah A 89 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT itu'). Rayuan tidak dibuat terhadap perintah yang pertama. Pada 22 Jun 1995, mahkamah memerintahkan bahawa pampasan tidak patut diberikan kepada perayu ('perintah yang kedua'). Pada 18 Julai 1995, perayu merayu terhadap perintah yang kedua. Perayu kemudiannya telah

memfailkan satu permohonan kepada Mahkamah Rayuan untuk perlanjutan masa bagi memfailkan notis rayuan berkenaan dengan perintah yang pertama. Sementara itu, perayu membuat satu permohonan untuk penggantungan prosiding supaya mengekalkan keutuhan rayuan terhadap perintah yang pertama. Isu di sini adalah sama ada perayu berhak untuk mendapatkan penggantungan prosiding itu. Sebagai menyokong permohonan untuk penggantungan prosiding itu, perayu mengatakan bahawa terdapat isu yang penting mengenai kepentingan awam yang akan dihujah di Mahkamah Rayuan dan ia berdasarkan persoalan sama ada seseorang yang mengatakan bahawa ianya mempunyai hakmilik tanah atau hak dalam ekuiti atau hak dalam kontrak dan yang telah tinggal di atas tanah itu untuk 37 tahun boleh dilucutkan hak untuk tinggal di sana oleh prosedur terus seperti yang dibayangkan oleh A 89 KMT itu. Seterusnya, dihujah bahawa A 89 KMT itu tidak mengikut undang-undang dan bahawa ia melanggar perkara 13 dalam Perlembagaan Persekutuan. Penghujahan ini namun demikian tidak disebut dalam afidavit seorang bernama Ng Eng Hing yang menyokong permohonan untuk penggantungan prosiding itu.

Diputuskan, menolak permohonan itu:

(1) Penggantungan prosiding timbul daripada satu perintah mahkamah dan ia bertindak untuk memberhentikan perjalanan prosiding itu. Perintah itu secara amnya bersifat budi bicara dan biasanya dibuat dengan berhati-hati dan hanya dalam keadaan istimewa atau yang luar biasa. Mahkamah mesti teliti dan berhati-hati supaya tidak mengusir plaintif daripada kerusi penghakiman dalam sesuatu permohonan untuk penggantungan prosiding sementara menunggu hari rayuan (lihat ms 538C–E; *Bettinson v Bettinson* [1965] Ch 465; [1965] 1 All ER 102, *Lawrence v Lord Norreys* (1890) 15 App Cas 210, *Wu Shu Chen (sole executrix of the estate of Goh Keng How, decd) v Raja Zainal Abidin bin Raja Hussin & Anor* [1995] 3 MLJ 224 dan *Dyson v A-G* [1911] 1 KB 410 diikut).

(2) Mengikut prinsip stare decisis, mahkamah diikat oleh keputusan Mahkamah Persekutuan untuk menggunakan pendekatan keadaan istimewa. Oleh kerana tidak terdapat rayuan terhadap perintah yang pertama, penghujahan yang diberikan dalam afidavit Ng Eng Hing untuk menyokong permohonan untuk penggantungan prosiding tidak boleh disifatkan sebagai keadaan istimewa. Perayu tidak perlu dikembalikan kepada kedudukan asal mereka kerana dengan tidak merayu terhadap perintah yang pertama, ia mesti dianggap bahawa mereka telah menerima perintah untuk milikan kosong yang memihak kepada Punca Klasik. Sememangnya, biarpun terdapat rayuan terhadap perintah yang pertama ia dengan sendiri tidak boleh membentuk keadaan istimewa. Lagipun, afidavit Ng Eng Hing tidak menyebut A 89 KMT itu yang dikatakan melanggar perkara 13 Perlembagaan

Persekutuan dan ini bermakna bahawa penghujahan mengenai perkara itu cumalah sesuatu yang hanya difikirkan kemudian (lihat ms 542A, F; *Kerajaan Malaysia v Dato' Haji Ghani Gilong* [1995] 2 MLJ 119, *Kerajaan Malaysia v Jasanusa Sdn Bhd* [1995] 2 MLJ 105, *Wu Shu Chen (sole executrix of the estate of Goh Keng How, decd) v Raja Zainal Abidin bin Raja Hussin & Anor* [1995] 3 MLJ 224 dan *Che Wan Development Sdn Bhd v Co-operative Central Bank Bhd* [1989] 3 MLJ 40 diikut; *See Teow Guan & Ors v Kian Joo Holdings Sdn Bhd & Ors* [1995] 3 MLJ 598 tidak diikut).

(3) Walaupun dengan menggunakan pendekatan 'permohonan itu sia-sia sahaja', permohonan untuk penggantungan prosiding itu tidak akan berjaya kerana kegagalan perayu untuk menunjukkan melalui keterangan afidavit bahawa rayuan itu akan dijadikan sia-sia sahaja jika perayu berjaya dalam rayuannya. Juga tidak terdapat apa-apa penyataan bahawa Punca Klasik tidak berada dalam kedudukan di mana ia boleh membayar apa-apa pampasan yang mungkin diaward oleh Mahkamah Rayuan kepada perayu sekiranya rayuan itu berjaya. Pada dasarnya, tidak terdapat fakta yang ditunjukkan dalam afidavit untuk menyokong penggantungan prosiding itu (lihat ms 542C–E, 543B).]

[*Editorial Note*: The appellants appealed to the Court of Appeal vide Civil Appeal No J–08–29–96. Lamin PCA, Abu Mansor and Ahmad Fairuz JJCA granted a stay of proceedings on 10 April 1996. The appellants' application vide Notice of Motion No J–02–263–96 for extension of time to file their notice of appeal in respect of the order dated 30 May 1995 was granted by Lamin PCA, Abu Mansor and Ahmad Fairuz JJCA on 10 April 1996.]

Notes

For a case on stay of proceedings pending appeal, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) para 3158.

Cases referred to

Alexander v Cambridge Credit Corp Ltd (1985) 10 ACLR 42
Bettinson v Bettinson [1965] Ch 465; [1965] 1 All ER 102
Charanjit Lal Chowdhury v Union of India & Ors, The AIR 1951 SC 41
Che Wan Development Sdn Bhd v Co-operative Central Bank Bhd [1989] 3 MLJ 40
Close v Steel Co of Wales Ltd [1962] AC 367; [1962] 2 All ER 953
Dickson v Trading (S) Pte Ltd v Transmarco Ltd [1989] 2 MLJ 408
Dyson v A-G [1911] 1 KB 410
Government of Malaysia v Datuk Haji Kadir Mohamad Mastan and another application [1993] 3 MLJ 514
Kerajaan Malaysia v Dato' Haji Ghani Gilong [1995] 2 MLJ 119
Kerajaan Malaysia v Jasanusa Sdn Bhd [1995] 2 MLJ 105

Lawrence v Lord Norreys (1890) 15 App Cas 210
Mohamed Mustafa v Kandasami (No 2) [1979] 2 MLJ 126
Monk v Warbey [1935] 1 KB 75
Osborne v Rowlette (1880) 13 Ch D 774
Punca Klasik Sdn Bhd v All Persons in Occupation of the Wooden House Erected on a Portion of Land Held Under Grant No 26977 for Lot 4271 in the Township of Johor Bahru, Johor and another case [1995] 4 BLJ 337
Richard West & Partners (Inverness) Ltd v Dick [1969] 2 Ch 424; [1969] 1 All ER 289
See Teow Guan & Ors v Kian Joo Holdings Sdn Bhd & Ors [1995] 3 MLJ 598
Serangoon Garden Estate Ltd v Ang Keng [1953] MLJ 116
Toh Kheng Heng & Anor v Ahmad Fauzi bin Mohd Taufek [1994] 1 MLJ 356
Ward v James [1966] 1 QB 273
Wu Shu Chen (sole executrix of the estate of Goh Keng How, decd) v Raja Zainal Abidin bin Raja Hussin & Anor [1995] 3 MLJ 224

Legislation referred to

Federal Constitution art 13
Land Acquisition Act 1960
Rules of the High Court 1980 O 89

Dominic Puthucheary (*Sanjay Mohanasundram* with him) (*Skrine & Co*) for the appellants.
Ng Chew Hor (*Oon Lay Yean* with him) (*Leng & Co*) for the respondent.

Abdul Malik Ishak J: On 30 May 1995, I ordered vacant possession in favour of the respondent ('Punca Klasik') pursuant to an application by Punca Klasik under O 89 of the Rules of the High Court 1980 ('the RHC') and this is clearly reflected in the notes of proceedings as set out in encl 14. A written judgment to that effect was handed down by me and this has since been reported (see *Punca Klasik Sdn Bhd v All Persons in Occupation of the Wooden House Erected on a Portion of Land Held Under Grant No 26977 for Lot 4271 in the Township of Johor Bahru, Johor and another case* [1995] 4 BLJ 337). It is instructive to note that there was no appeal lodged with regard to the decision of this court dated 30 May 1995. On the issue of compensation, I had on 22 June 1995 ordered that no compensation was forthcoming to the appellants (see p 19 of encl 14) and this meant that my decision favoured Punca Klasik. On 18 July 1995, the appellants lodged an appeal against that part of my decision dated 22 June 1995 and the notice of appeal was worded in this fashion (see exh 'NEH 1' of encl 22):

Notis Rayuan

Ambil perhatian bahawa Ng Eng Hing, perayu yang dinamakan di atas, bercadang hendak merayu kepada Mahkamah Rayuan terhadap keseluruhan keputusan Yang Arif Abdul Malik Ishak H yang diberikan di Johor Bahru pada 22 Jun 1995.

Bertarikh pada 18 Julai 1995

— tt —
Perayu
Peguamcara bagi perayu

I am now told that the appellants have since filed an application for an extension of time to file their notice of appeal with regard to my order dated 30 May 1995 to the Court of Appeal. In the meantime, by encl 23 and supported by an affidavit in encl 22, the appellants made an application for a stay of proceedings in order to preserve the integrity of the appeal against my order dated 30 May 1995.

A stay of proceedings arises under an order of the court and, in essence, it puts a stop to the further conduct of the proceedings. The order is generally discretionary in nature (see *Bettinson v Bettinson* [1965] Ch 465; [1965] 1 All ER 102) and generally made very sparingly and only in exceptional circumstances (see *Lawrance v Lord Norreys* (1890) 15 App Cas 210 at p 219) or what is known in the local scene as special circumstances (see *Wu Shu Chen (sole executrix of the estate of Goh Keng How, decd) v Raja Zainal Abidin bin Raja Hussin & Anor* [1995] 3 MLJ 224) of which I have more to say later. It is true to say that the court will exercise great care and circumspection so as not to drive the 'plaintiff from the judgment seat' when confronted with an application for a stay of proceedings pending an appeal (see *Dyson v A-G* [1911] 1 KB 410 at p 419 (CA)).

It was argued that there was a vital issue of public interest that will be canvassed before the Court of Appeal and it revolved on the question of whether a person who claims to have a proprietary right in land or a right in equity or a right in contract and who has stayed on the land for 37 years could be deprived of the right to stay there by a summary procedure under O 89 of the RHC. It was submitted that the procedure envisaged in O 89 of the RHC was not in accordance with law and that it infringed art 13 of the Federation Constitution which provided that:

> 13 (1) No person shall be deprived of property save in accordance with law.
>
> (2) No law shall provide for the compulsory acquisition or use of property without adequate compensation.

The RHC is a major source of procedural law in this country. It has statutory flavour in matters of procedure. To say that O 89 of the RHC contravened art 13 of the Federal Constitution seems to overlook the all important aspect of the RHC as a whole in that they are there to provide justice fairly and expeditiously. The RHC can never alter the substantive law (see *Ward v James* [1966] 1 QB 273) especially that part in regard to the compulsory acquisition of a registered proprietor's interest in land. An alienated land may be compulsorily acquired by the state authority through the mechanism of the Land Acquisition Act 1960 ('the Act'). On the facts, the appellants here were not the registered proprietors of approximately 24 acres of land nor the miserable 11,625 square feet out of the 24 acres on

A which they sought to lay claim. On the other hand, Punca Klasik was the registered proprietor of the entire 24 acres which included the 11,625 square feet of land that was in issue. That the state authority has the power to acquire cannot be denied and is best described by Bk Mukherjee J in *Charanjit Lal Chowdhury v The Union of India & Ors* AIR 1951 SC 41 especially at pp 53 and 54 in the following words:

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> It is a right inherent in every sovereign to take and appropriate private property belonging to individual citizens for public use. This right, which is described as eminent domain in American law, is like the power of taxation, and off-spring of political necessity, and it is supposed to be based upon an implied reservation by government that private property acquired by its
> C citizens under its protection may be taken or its use controlled for public benefit irrespective of the wishes of the owner.

The Act also makes provisions for the assessment of compensation to be made as a result of such acquisition and other matters incidental thereto. All said and done, no matter how attractive the arguments were fashioned
D in regard to O 89 of the RHC which was said to infringe art 13 of the Federal Constitution, yet these were not reflected in the affidavit of Ng Eng Hing in encl 22 that was affirmed on 17 November 1995 in support of the application for a stay of proceedings pending the hearing of the appeal. Enclosure 22 adverted to the appeal that was lodged against the order dated 22 June 1995 and that the appeal has since been registered and given an
E appeal number by the Court of Appeal. It was deposed in encl 22 that Punca Klasik and its agents were present at lot 4271 to execute the order dated 22 June 1995 for vacant possession of lot 4271 which included the appellants' premises. Here, I must point out that if the order was in regard to vacant possession it must be in relation to the order dated 30 May 1995
F because the order dated 22 June 1995 was in relation to the issue of compensation. It was next deposed in encl 22 that Ng Eng Hing's family members had stayed in the premises for more than 37 years and that there were other occupants of lot 4271 who are awaiting the outcome of the other suits and that Punca Klasik should take cognizance of this fact before they executed the order — and this must be in relation to the order dated 30
G May 1995. Enclosure 22 also contained an averment that the appellants would suffer grave loss if the execution was carried out and should they succeed in the appeal they would never be put back to their original position; it was said that no amount of damages could possibly compensate them. Ng Eng Hing heavily relied on the special circumstances approach in
H encl 22 to drive home the message that the family home was in jeopardy and, consequently, it was said that this court should exercise its discretion in favour of granting the stay pending the disposal of the appeal. It was deposed that there was merit in the appeal and that the matter was one of public importance. But what that public importance was was never adverted to at all in encl 22.

I It was submitted that the law in regard to the grant of a stay of execution or a stay of proceedings has changed. My attention was drawn to the recent Court of Appeal case of *See Teow Guan & Ors v Kian Joo Holdings Sdn Bhd & Ors* [1995] 3 MLJ 598 (CA), where it was held that

the court before which a stay of execution or a stay of proceedings was filed no longer needs to examine whether there were special circumstances in existence but rather must consider whether unless the stay was granted the appeal, if successful, would be rendered nugatory ('the nugatory approach'). Indeed, that was a robust approach and Gopal Sri Ram JCA, in delivering the judgment of the Court of Appeal in *See Teow Guan* summarily buried, so to speak, the decision of Brown J in *Serangoon Garden Estate Ltd v Ang Keng* [1953] MLJ 116 where the special circumstances approach was propounded, when his Lordship said at p 606:

> The authority constantly relied upon in support of the proposition that special circumstances ought to be demonstrated before a stay of execution may be granted is the judgment of Brown J in *Serangoon Garden Estate Ltd v Ang Keng* [1953] MLJ 116. For my part, having considered the more recent authorities on the subject, I have come to the conclusion that that decision is bad law, and ought no longer to be followed by this court.

Now, what were 'the more recent authorities' his Lordship Gopal Sri Ram JCA considered in *See Teow Guan*? His Lordship Gopal Sri Ram JCA considered the Singapore High Court decision of Chan Sek Keong JC (as he then was and now the A-G of Singapore) in the case of *Dickson Trading (S) Pte Ltd v Transmarco Ltd* [1989] 2 MLJ 408, the decision of Abdul Hamid J (who rose as LP) in *Mohamed Mustafa v Kandasami (No 2)* [1979] 2 MLJ 126 and the case of *Alexander v Cambridge Credit Corp Ltd* (1985) 10 ACLR 42 to conclude at p 610 that:

> If upon balancing all the relevant factors, this court comes to the conclusion that an appeal would be rendered nugatory without the grant of a stay or other interim preservation order, then, it should normally direct a stay or grant other appropriate interim relief that has the effect of maintaining the status quo.

With respect, *See Teow Guan* did not consider the Federal Court cases of *Kerajaan Malaysia v Jasanusa Sdn Bhd* [1995] 2 MLJ 105 (FC) and *Kerajaan Malaysia v Dato' Hj Ghani Gilong* [1995] 2 MLJ 119 (FC). These two authorities from the highest court in the country, in no uncertain terms, entrenched the special circumstances approach in the context of a stay of execution of a judgment and, I may add, a fortiori it must also be extended to apply to an application for a stay of proceedings in order to preserve the integrity of an appeal.

Edgar Joseph Jr FCJ, in delivering the judgment of the Federal Court in *Jasanusa*, agreed with the special circumstances approach in granting a stay as applied by Ian Chin J (see *Government of Malaysia v Datuk Haji Kadir Mohamad Mastan and another application* [1993] 3 MLJ 514). In fact, his Lordship Edgar Joseph Jr FCJ in *Jasanusa* quoted in verbatim passages from the decision of Ian Chin J in regard to the special circumstances approach and concluded in erudite terms at p 117 as follows:

> With respect, we considered that there was ample material for the learned judge to have exercised his discretion by extending the order for stay and his decision to do so was in no way contrary to his earlier ruling to grant a limited stay.

A It is well settled law that the exercise of such a discretion will be interfered with by an appellate court only in exceptional circumstances; for example, where it has been demonstrated that the decision of the judge below is shown to have depended on an erroneous basis of law or fact or where no reasonable explanation is open save that the decision depended on an erroneous basis of law or fact. More particularly, the fact that we, as an B appellate court, might have exercised the discretion differently is beside the point and will not therefore constitute a sufficient ground for overturning the judge's decision to grant the limited stay.

Applying the above principles to the circumstances of the present case, we considered that there were no grounds upon which we would have been justified in interfering with the learned judge's exercise of discretion in C extending the order for stay.

The result, therefore, was that at the conclusion of the arguments, we had dismissed this appeal with costs.

In *Dato' Hj Ghani Gilong*, Edgar Joseph Jr FCJ speaking for the Federal Court emphasized the special circumstances approach when his Lordship D succinctly said at p 129:

> We noted, that in the instant appeal, there was no formal application for stay supported by an affidavit affirmed by the taxpayer or his duly authorized agent, alleging special circumstances to justify the making of the order for stay. In other words, although the onus was upon the taxpayer to demonstrate E special circumstances justifying a stay, there was no material upon which the judge could have granted the order for a stay.

I will now address my mind to the principle of 'stare decisis' or what is commonly known as the principle by which a court is bound to follow decisions in former cases. The use of precedent is an indispensable tool in F a court of law. It is an indispensable foundation upon which the judge is to decide what is the law and what is its application to individual cases. The only thing that I can see in a judge's decision binding as an authority is the principle upon which the case was decided (see *Osborne v Rowlett* (1880) 13 Ch D 774 at p 785). In my considered view, judicial authority belongs not to the exact words used nor even to all the reasons given, but only to the G principles accepted and applied as necessary grounds of the decision (see *Close v Steel Co of Wales Ltd* [1962] AC 367; [1962] 2 All ER 953 (HL)). Thus, the enunciation of the reason or principle upon which a question before the court has been decided is said to be binding as a precedent. What constitutes binding precedent is the ratio decidendi and this is ascertainable by an analysis of the material facts of the case. It is always dangerous to take H one or two observations out of a long judgment and treat them as if they gave the ratio decidendi of the case (see *Monk v Warbey* [1935] 1 KB 75 at p 78 (HL)). It is germane to mention that mere passing remarks of a judge are known as 'obiter dicta', whilst considered enunciations of the judge's opinion on a point not arising for decision, and so not part of the ratio I decidendi, have been termed as 'judicial dicta' (see *Richard West & Partners (Inverness) Ltd v Dick* [1969] 2 Ch 424 at p 413; [1969] 1 All ER 289 at p 292). With respect, the decision in *See Teow Guan* in respect of the approach to be adopted when confronted with an application for a stay at

best can be described as 'obiter dicta'. *See Teow Guan* jettisoned the special circumstances approach in favour of the nugatory approach without considering the decisions of the Federal Court in *Jasanusa* and *Dato' Hj Ghani Gilong*. On the principle of stare decisis, I am bound by the two decisions of the Federal Court and, consequently, the special circumstances approach was adopted by me.

The special circumstances approach which merited a stay was also vigorously applied in *Che Wan Development Sdn Bhd v Co-operative Central Bank Bhd* [1989] 2 MLJ 40; *Toh Kheng Heng & Anor v Ahmad Fauzi bin Mohd Taufek* [1994] 1 MLJ 356 and *Wu Shu Chen (sole executrix of the estate of Goh Keng How, decd) v Raja Zainal Abidin bin Raja Hussin & Anor* [1995] 3 MLJ 224. Be that as it may, even if I were to apply *See Teow Guan* in that the stay should be granted so as not to render the appeal by the appellants nugatory in the event the appeal would be successful as suggested by learned counsel for the appellants, I must not lose sight of the fact that the notice of appeal was in relation to the question of compensation and this was in relation to my order dated 22 June 1995. Emphasis must also be laid to the failure by the appellants to demonstrate by affidavit evidence that the appeal would be rendered nugatory in the event the appellants succeeded in the appeal. There was also an absence of any averment that Punca Klasik was not in a position or without any financial means to satisfy any compensation that may be awarded to the appellants by the Court of Appeal in the event the appeal against the order dated 22 June 1995 was successful. Thus, in the absence of any evidence to the contrary, I must assume that Punca Klasik is not insolvent.

Since there was no appeal in regard to my order dated 30 May 1995, the arguments that the appellants had stayed in the house for 37 years, that the appellants were not illegal squatters and had legal rights, that the building if destroyed would deprive the family of a place to stay, that inconvenience, hardship and oppressive circumstances would prevail in that the appellants would find it difficult to find an alternative accommodation, must surely be nothing more than an exercise in futility. These cannot be considered to be special circumstances. There was no need to put the appellants back to their original position because by not appealing against the order dated 30 May 1995, it must be presumed that they were happy with the order for vacant possession granted in favour of Punca Klasik. The affidavit in support of the stay in encl 22 too did not advert to O 89 of the RHC which was said to infringe art 13 of the Federal Constitution and, consequently, the submission on this point can best be described as an afterthought. Bluntly put, it was an embellishment and nothing else. It was also an embellishment when it was submitted that the conditions under which the land was sold to Punca Klasik must be looked into as this was not adverted to at all in encl 22.

Next, it was argued that the notice of appeal filed in regard to decision dated 22 June 1995 must surely encompass the decision dated 30 May 1995 on the basis of the words 'terhadap keseluruhan keputusan' that appeared in the notice of appeal. With respect, there was no merit to this argument. One may circumvent this argument by advancing a question

A that: if that is the case why must the appellants file an application for extension of time to file their notice of appeal to the Court of Appeal in regard to the order dated 30 May 1995 unless the appeal that was filed on 18 July 1995 related to the decision dated 22 June 1995?

Whichever approach I adopt, be it the *See Teow Guan* approach or
B that as propounded by Brown J in *Serangoon Garden Estate Ltd* which subsequently became entrenched in *Jasanusa* and *Dato' Hj Ghani Gilong*, the end result would be the same. In the exercise of my judicial discretion, there was no material demonstrated in the affidavit for a stay of the proceedings as sought for by the appellants. In a long judgment as reported in [1995] 4 BLJ 337, I have considered all the points raised by all parties
C before I gave the decisions dated 30 May 1995 and 22 June 1995. Even if there was an appeal in regard to my decision dated 30 May 1995, which was not the case here, that by itself cannot constitute special circumstances (see *Wu Shu Chen v Raja Zainal Abidin bin Raja Hussin*). As NH Chan J (now JCA) said in *Che Wan Development Sdn Bhd v Co-operative Central*
D *Bank Bhd* [1989] 3 MLJ 40 at p 43:

> Merits or strong grounds for an appeal are also not special circumstances. In *Atkins v GW Ry* (1886) 2 TLR 400, Lord Esher MR said:
>
> '... but that there were strong grounds for an appeal was no reason, for no one ought to appeal without strong grounds for doing so.'

E In another part of his judgment, NH Chan J (now JCA) in the same case said at p 43 right hand column at E:

> In other words, grounds affecting the validity or correctness of the judgment or order appealed from are not special circumstances.

F For the reasons adumbrated above, I dismissed encl 23 with costs. The appellants' counsel quickly orally applied for an interim stay of my order to enable him to apply direct to the Court of Appeal on a certificate of urgency. I refused his application.

Application dismissed.

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Reported by Kenneth Goh Jenn Huei

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